Comments
and
Notice of Intent to Participate

Docket No 2002-1 CARP DTRA3
2001-2- CARP DTNSRA

Digital Performance Right in Sound Recordings Rate Adjustment

1. Radiopoly.Com LLC
2. Internet FM.Com
3. Live365.com
4. Lester Chambers
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May 21, 2003

Copyright Arbitration Royalty Panel (CARP)
P.O. Box 70977
Southwest Station
Washington, DC 20024-0977

Re: Comments on Proposed 37 CFR Part 262 [Docket Nos. 2002-1 CARP DTRA3 and 2001-2 CARP DTNSRA], Digital Performance Right in Sound Recordings and Ephemeral Recordings

Agency: Copyright Office, Library of Congress

ORIGINAL

To Whom It May Concern:

As an owner of the copyright on several works, I am always interested in what the Copyright Office does regarding the rights in those works. I noticed the change in 37 CFR, which will be adding a new Part 262, Rates and Terms for Certain Eligible Nonsubscription Transmissions, New Subscription Services and the Making of Ephemeral Reproductions. I would like to comment on the proposed rule, please.

A summary of my comments is as follows:

1. The overall approach seems reasonable and realistic given the Congressional mandates on the Office.

2. There are some concerns about how the new rule affects the interests of both:
   A. Small webcasters, especially because of the barriers to entry caused by up-front fees; and
   B. Copyright Owners, especially because of market distortions, unclear payment provisions, and vague standards for searches for unknown Copyright Owners by the Designated Agent.

3. The drafting could be improved for clarity.

1. The Congressional Mandate and CARP's Response

The new 37 C.F.R. Part 262 is a response to the revisions of 17 U.S.C. 114 made in the Small Webcaster Settlement Act of 2002 (Public Law 107-321, 2002). Part 262 shows a sincere effort to follow Congress's standards for the development, monitoring, and provision of an infrastructure for payments to the copyright owners. The Copyright Arbitration Royalty Panel (CARP) developed a negotiated agreement with small commercial webcasters and noncommercial webcasters and providing for standards for such things as deductibility and direct payment to artists, just as mandated. It is noteworthy how well the agreement tracks Congress's guidelines of including "provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee," which is the exact payment scheme used in the rule. And, since Congress seems to have made no determination on what those levels of royalties and fee should be, leaving it virtually up to the negotiation process, the rates set in the rule seem to fall within that broad scope of CARP's authority.

2. Substantive Concerns

There are still some concerns that I see as being evident in the new rule.

Congress is aware of the problems that have already come up. It noted in the Small Webcaster Act of 2002's findings section that some small webcasters had "reservations about the fee structure" that became 37 C.F.R. 261, the rule adopted before this new proposal. Even after CARP's subsequent negotiations that led up to the new law that allowed for this new rule, Congress still seems to have its reservations:

> (5) Congress has *made no determination as to whether the agreement provides for or in any way approximates fair or reasonable fees and terms, or rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.*
> (6) *Congress likewise has made no determination as to whether the July 8 order is reasonable or arbitrary*, and nothing in this Act shall be taken into account by the United States Court of Appeals of the District of Columbia Circuit in its review of such order. *(Emphasis added)*

Small Webcasters – Barriers to Entry:

For small webcasters to comply with the rule, according to Section 262.3(d), they must first pay a minimum annual fee (Section 262.3(d) of either $2,500 (for most webcasters) or $5,000 (for the Percentage of Subscription Service Revenues Option). These fees are nonrefundable, but fully creditable to royalty payments due. This is a considerable barrier for entry into the legal webcasting market.

What this means is, for a Licensees using the Per Performance Option to break even with that $2,500 fee, it must have a volume of over 3,280,000 Performances (essentially, a song or a part of a song delivered to a user) sold, at the rule's $0.000762 per Performance. Webcasters using the Aggregate Tuning Hour Option would have to have over 223,000 aggregate hours of use logged to break even at $0.0117 per hour. Even those choosing the Percentage of Subscription Service Revenues Option would have to have approximately 1,543 subscribers (or nonpaying temporary users) if paying the minimum $0.27 per subscriber per month.

These numbers suggest a substantial size and success necessary for a webcaster to successfully comply with the rule as a licensee. They also imply rather large numbers of users and a certain level of sophistication and infrastructure of the Licensees.

Granted, there is a certain efficiency needed for the administration of a program such as this, and dealing with tiny webcasters could get expensive for the CARP for such things as infrastructure and staff. However, since there is no minimum size stated for licensure, any webcaster broadcasting copyrighted Performances while not being a Licensee is presumably violating the rule.

This all seems to favor the bigger, already established participants in the market, despite it being nominally aimed at small webcasters. It seems telling that the Designated Agent to receive statements of account and royalty payments is not a separate, independent entity but is an unincorporated division of the mammoth, big-business-oriented Recording Industry Association of America (RIAA).

This is not a new concern; Congress strongly implied, by the passage of the Small Webcaster Settlement Act of 2002, that the domination of the process by the larger interests was a problem that needed to be addressed, noting the complaints of the small webcasters who had not participated in the panel proceeding leading to the original rates and terms reflected in Part 261. But with RIAA's continued involvement as the repository and manager of the money, there is still an appearance that the "big business" side of things dominates even this new.

There is room in the legislation and rules for a new Designated Agent to be created. That has not yet happened, presumably for administrative and fiscal convenience. Convenience, though, should not be allowed to trample other concerns.

Perhaps the fair and realistic application of the rule would become more evident if:

1. The up-front fees were lowered; and
2. An independent Designate Agent was created.

Copyright Owners – Market Distortions, Payments, and Unknown Copyright Owners:

Any time regulation takes over for the free market, distortions in the market occur. In this case, it can be seen that, by setting rates that are equivalent for all precludes

differential rates for royalties for different works. But the "per-play" type of royalty scheme has been in place for years, evident mostly in such things as ASCAP and BMI monitoring and payment approaches.

Still, there does not seem to be clear direction how the non-per Performance fees, such as Percentage of Subscription Service Revenues Option, are to be split between Copyright Owners. Will a monitoring system be developed to divide up the royalties collected under those provisions, similar to ASCAP and BMI's monitoring of radio stations? This is not clear.

Also, there are some provisions on what is supposed to happen to payments made for which the Designated Agent "is unable to locate" the Copyright Owner. Those unclaimed funds to be placed in a segregated trust account to be held for the Copyright Owner for three years (262.8), which appears to be a reasonable approach. However, there seems to be no specifics, especially in 262.4(b)(2)(vi), of what kind of standard the Designated Agent would be held to for the effort in trying to locate the Copyright Owner. It could be difficult for a Copyright Owner to claim that the Designate Agent did not perform its duty under that provision, since no standard of that duty is provided. Would a "after reasonable search" standard be appropriate?

Again, there is a strong pro-big-business implication through all of this: Copyright Owners that are members of a larger collective, such as ASCAP, will have a lot more protection than unaffiliated Copyright Owners. While this is most certainly true in a practical sense, that prejudice need not be ensconced in the system set up in the newly created rule.

3. Drafting Improvements

Though I realize the Carter-era Executive Order requiring executive branch agencies to write in plain English was rescinded, there is no excuse not to write clearly. One would especially expect that the Copyright Office, being under the auspices of the Library of Congress, would by its very nature be concerned with writing style. The use of poor writing techniques such as Latinisms or convoluted sentence structure should be avoided. Unclear writing makes the language difficult to read and introduces unintended ambiguity. The drafting in the new rule could be improved.

Here are a few things I noticed on a quick review of the proposal:

1. The **language is inconsistent.** For example, why does Section 262.2 use the varying constructions "means," "is," and "shall mean" for the definitions? The reader is left struggling to search for the reasoning behind the differences when it is actually just plain inconsistency.

2. There is a **tendency toward wordiness.** Some examples are:

    262.2(a): "By way of example" could be "For example."

262.3(a)(1)(i) and 2(i): "For the avoidance of doubt" is superfluous.

3. The **abbreviated Latinism** "e.g." is used in 262.2(i)(1). Why not use the English phrases "such as" or "for example"?

4. The use of a **proviso** is usually ambiguous. Yet it is injected into such sections as 262.3(a)(1)(i). Why use it at all? Separate, declarative sentences or transitions such as "however" or "except that" avoid the ambiguity inherent in a "provided, that" and actually enhance the clarity of the thought.

5. There is a rather **casual use of "which"** that causes ambiguity. Sec. 262.2(a) has an example of this:

> ...less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)2) or which [that] do not require a license under United States copyright law.

Notice how the second "which" is actually introducing a restrictive clause, defining a certain type of sound recordings (ones that do not require a license under United States copyright law). For a restrictive clause, the proper word is "that." Though there is a slightly different rule for the use over in England, most American usage books follow this rule.

Most instances of the less-than-careful use of "which" in the call for comment are found in the Supplementary Information for the rule.

With all of this in mind, look how just a few minimal changes in one of the paragraphs affect its clarity. This is 262.3(a)(1)(i):

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> (i) Per Performance Option. $0.000762 (0.0762[cent]) per Performance for all digital audio transmissions, except that 4% of Performances shall bear no royalty to approximate the number of partial Performances of nominal duration made by a Licensee due to, for example, technical interruptions, the closing down of a media player or channel switching; Provided that this provision is not intended to imply that permitting users of a service to "skip" a recording is or is not permitted under section 114(d)(2). For the avoidance of doubt, this 4% exclusion shall apply to all Licensees electing this payment option irrespective of the Licensee's actual experience in respect of partial Performance.

RECOMMENDED EDITS

[with some slight explanations – strikethroughs are deletions, underlines are additions]

(i) Per Performance Option. $0.000762 (0.0762[cent]) per Performance for all digital audio transmissions~~, except that~~. However, 4% of Performances shall bear no royalty. *[The rest of this sentence is not a rule, it is an explanation; if necessary, it could be put in the explanatory material to the rule, not the rule itself.]* ~~to approximate the number of partial Performances of nominal duration made by a Licensee due to, for example, technical interruptions, the closing down of a media player or channel switching; Provided that this provision is not intended to~~. However, 4% of Performances shall not bear royalty. This 4% exclusion does not imply that permitting users of a service to "skip" a recording is or is not permitted under section 114(d)(2). *[This next phrase is superfluous]* ~~For the avoidance of doubt, t~~This 4% exclusion ~~shall apply~~ applies to all Licensees electing this payment option irrespective of the Licensee's actual experience in respect of partial Performance.

FINAL EDITED VERSION

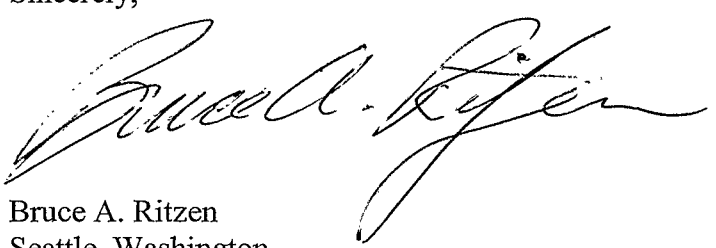
(i) Per Performance Option. $0.000762 (0.0762[cent]) per Performance for all digital audio transmissions. However, 4% of Performances shall not bear royalty. This 4% exclusion does not imply that permitting users of a service to "skip" a recording is or is not permitted under section 114(d)(2). This 4% exclusion applies to all Licensees electing this payment option irrespective of the Licensee's actual experience in respect of partial Performance.

4. Conclusion

This new 17 CFR Part 262 is a good start. But there are some aspects that could be revisited and improved. It does not seem that I am alone in my reservations. After all, Congress expressed concerns in the Small Webcaster Settlement Act of 2002, both in the Act's findings and by requiring the delivery of a study next year concerning such things as the economic arrangements among small commercial webcasters covered by the agreements embodied by the rule, the effect of the rule on third parties, and the effect of those arrangements on royalty fees payable.

Thank you for allowing me the opportunity to comment. I hope this was useful.

Sincerely,



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